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No. 85-315

In the Supreme Court of the United States

October Term, 1985

THOMAS J. ITALIANO,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER QUESTION OF LAW

1. The Fourteenth Amendment of the Constitution of the United States, specifically the due process of law clause, is not violated where the duties of police witnesses are defined to include the unbiased presentation to the prosecuting attorney of the facts leading to an arrest.

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To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions presented herein were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Su-

preme Court of Ohio. The trial court, sitting as the finder of fact, found the petitioner guilty of two counts of attempted bribery. The Court of Appeals affirmed the judgment of conviction. The Supreme Court of Ohio granted jurisdiction, and subsequently affirmed the judgment of the Eighth District Court of Appeals.

The Ohio Courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States and the applicable decisions of this Court. There is, therefore, no substantial federal question presented by the petition for certiorari.

STATEMENT OF THE CASE

Petitioner, Thomas J. Italiano, was indicted in two cases, CR 179832 and CR 180199, of the offenses of bribery in violation of Ohio Revised Code, Section 2921.02.

Petitioner waived his right to a trial by jury and was tried by the Court on June 30, 1983. The trial court rendered a verdict of guilty on each of the two counts of bribery on July 6, 1983. Prior to sentencing, the trial judge vacated his guilty finding and found defendant guilty of two counts of attempted bribery. Petitioner was sentenced on August 3, 1983. The Petitioner's actions were consolidated before the Eighth District Court of Appeals. The verdict of the trial court was affirmed by the Eighth District Court of Appeals on April 5, 1984.

The Supreme Court of Ohio granted jurisdiction to the petitioner. The Supreme Court of Ohio affirmed the judgment of the Court of Appeals on June 26, 1985, at 18 Ohio St. 3d 38, and reprinted in Appendix A.

STATEMENT OF THE FACTS

Cleveland Police Patrolmen Robert Moczulski and William Hyland were assigned to a marked police vehicle on August 29, 1982. The officers were on routine patrol in the Cleveland Police Sixth District when they observed an automobile driven by Jerry Riffel. The actions of the driver led these officers to place Jerry Riffel under arrest for driving while intoxicated and for peeling tires. Charges were subsequently filed by the Cleveland Municipal Prosecutor's Office (R. 10).

Subpoenas were issued by the Cleveland Municipal Court for appearance in Court of both patrolmen for the date of December 15, 1982 (State's Exhibit 7 and R. 10). Officer Moczulski appeared as subpoenaed and Officer Hyland was engaged in another court appearance (R. 10, 11).

Patrolman Moczulski was approached while in the courtroom by the attorney for Jerry Riffel, petitioner Thomas Italiano. After being asked to step out of the courtroom, Officer Moczulski was asked if he "would accept a plea from his through [sic]—from his client through him to the charge of reckless operation." (R. 15).

Officer Moczulski replied: "I told him absolutely no." (R. 15).

The officer continued:

> "I don't know how they operate in Parma . . . the best they could expect from me (Patrolman Moczulski) here and the Court itself through the prosecutor would be a reduction from State DWI to City Physical Control." (R. 15).

When pressed by petitioner, Officer Moczulski responded that reckless operation "absolutely" did not apply (R. 16). Petitioner then sought and obtained a continuance of the matter. Petitioner asked the patrolman if he could contact the officer at a later date (R. 16, 17).

Petitioner telephoned Officer Moczulski on January 4, 1983. Petitioner requested a meeting in person because "the police phones are taped" (R. 20).

Petitioner did not want to meet with Officer Moczulski at the Police Department, Second District (R. 20, 21). Petitioner concluded this telephone call by stating, "If you will meet me I think it will be worth your while" (R. 22).

Petitioner asked Patrolman Moczulski to meet with him in his office at the Parma City Hall on Friday, January 8, 1982 at 4:00 p.m. (R. 21). After informing his partner, Officer Hyland, Patrolman Moczulski completed his assigned shift, went to his home and contacted Lieutenant Gurtsak of the Cleveland Police Intelligence Unit. Lieutenant Gurtsak advised Officer Moczulski to contact the Cleveland Police Professional Conduct and Internal Review (PCIR) Unit that next morning (R. 25, 26). After reporting the above facts and under the direction of PCIR Sergeant Mark Romph, Patrolman Moczulski placed a controlled, recorded telephone call to petitioner (R. 26, 27). A meeting was arranged at 4:20 p.m. in an open area which facilitated surveillance and photographing were such steps necessary (R. 28-30) (State's Exhibit 1A, Joint Exhibit A).

The January 7, 1982 meeting took place between petitioner and Officer Moczulski in the latter's vehicle (R. 29).

State's Exhibit 2B and Joint Exhibit B set forth the contents of the resulting conversation and contain the physical passing of a bank envelope, containing fifty dollars, and business cards. These items were accepted into evidence as State's Exhibit 3.

Petitioner asked Officer Moczulski to give his client a break (State's Exhibit B and Joint Exhibit B, page 5). Petitioner further stated his client would "show his gratitude. . ." (Joint Exhibit B, page 7). The conversation continued to cover the gambit of possibilities which were intended to gain a reduction in Riffel's charges (Joint Exhibit B, pages 10-12).

Further evidence at trial includes the testimony of Patrolman William Hyland.

Officer Hyland testified that he was subpoenaed to appear at scheduled pre-trial conferences on December 15, 1982 and January 26, 1983. The patrolman also stated that he spoke with his partner, Officer Moczulski concerning the January 4, 1983 telephone call from petitioner (R. 98).

Officer Hyland related that petitioner stated that there was a "prior arrangement" made with Officer Moczulski (R. 103); he would give Patrolman Hyland fifty dollars ($50.00) (R. 104); he wanted the officers to get together so they would know the deal that had transpired (R. 120); and, that he had given Officer Moczulski fifty dollars ($50.00) (R. 122).

Officer Hyland testified on direct examination that petitioner accompanied him to the Clerk's Office, received change for a one hundred dollar bill ($100.00) and together they returned to the courtroom (R. 122-124, 128-130). Petitioner handed Officer Hyland fifty dollars

($50.00) (State's Exhibit 4) while near the phone booths on the thirteenth floor. The case was then continued as petitioner preferred to proceed when Patrolman Moczulski was present, due to the "arrangements" (R. 134).

Sergeant Mark Romph testified that he was the PCIR Unit investigator assigned to this case. He stated that he interviewed Patrolmen Moczulski and Hyland. Sergeant Romph further identified the *Manual of Rules and Regulations and Procedures of the Cleveland Police Department,* Section 3.18, Prohibited Conduct (State's Exhibit 11), which states:

> "Personnel of the division of police shall not accept or solicit any present of money or other valuable thing from any person under their jurisdiction, or control of with whom they had had or are likely to have official relations." (R. 156, 157).

Sergeant Romph monitored the phone call of January 5, 1983, observed the meeting of January 7, 1983, was the officer in control of photographing of, and listened to the transmission of that meeting while in a surveillance capacity (R. 159, 161). Sergeant Romph further maintained custody and control of the tapes and photos in evidence (State's Exhibits 1-4 and 7-13).

Mrs. Diana Lee Riffel testified that she and her husband, Jerry Riffel retained petitioner to represent Mr. Riffel in the subject DWI proceedings. She testified that she paid petitioner's requested retainer of three hundred and fifty dollars ($350.00) in two installments, one of two hundred dollars ($200.00) and one hundred and fifty dollars ($150.00). Further evidence shows that on September 30, 1982, petitioner gave the Riffels a receipt for the fee marked

"Received of Jerry Riffel, $150, legal fee, balance in full for DWI.

ss/-T.J. Italiano."
(State's Exhibit 9)
(R. 149).

Mrs. Riffel testified that at the December 15, 1982 pre-trial conference, petitioner stated:

". . . he needed a hundred dollars, that the police needed a hundred. . . He said the police officers told him they were too underpaid to play Mr. Nice Guy and give anybody a break, and he thought $100.00 would take care of it." (R. 145).

Mrs. Riffel then gave petitioner the requested one hundred dollars ($100.00). She continues that during a telephone conversation in January, 1983, he further requested another one hundred dollars ($100.00) at the future January 26, pre-trial (R. 145).

Mr. Riffel gave petitioner an additional one hundred dollar bill ($100.00) on January 26, 1983 at the pre-trial conference (R. 146). Petitioner told the Riffels that:

". . . the one police officer has supposedly double-crossed the other one and didn't know nothing of the deal the other police officer had made beforehand. So we (the Riffels) assumed he was going to give it to that police officer." (R. 147).

Mrs. Riffel presented one of the defendant's business cards upon which he had noted the first one hundred dollar payment and upon which she had noted the second (R. 150) (State's Exhibit 10).

REASONS FOR DENYING THE WRIT

The actions of petitioner clearly violated Ohio Revised Code, Section 2921.02 which states *inter alia*:

> "2921.02 Bribery.
>
> (A) No person, with purpose to corrupt a public servant or party official, or to influence him with respect to the discharge of his duty, whether before or after he is elected, appointed, qualified, employed, summoned, or sworn, shall promise, offer, or give any valuable thing or valuable benefit."

The arguments of petitioner attempt to create, then subsequently demolish a "straw man" of police authority. Contra to petitioner's contentions, Federal and State law is replete with examples and definitions of both bribery and "duty" as used in the statute.

Established legal definitions of the scope of the purpose of bribery hold that it is as broad as the duties of the officer who accepts the bribe. 12 AM. JUR. 2d, *Bribery*, Section 8.

This scope of purpose must be considered to encompass all relevant actions of a municipal law enforcement officer. The duties of such officers are seen to flow from the basic enforcement of the law and protection of citizens through the requisite judicial proceedings. Therefore, the interaction of the police officer and the prosecuting attorney is not separated by any line of demarcation. Indeed, no prosecution can proceed without honest, intelligent cooperation and testimony by police officials with the prosecuting attorney. Further discussion on this point seems needless as the Ohio Revised Code, in Section 290.01

(K)(1) and (8) defines both municipal police officers and assistant prosecuting attorneys as "law enforcement officers."

The duty at issue here includes the duty to arrest one who violates an ordinance or law within the law enforcement officer's jurisdiction. It further must be construed to encompass assistance by the officer in all proceedings based upon his arrest. The prosecuting attorney in the instant case must rely upon the professional assessment of the officers for the attorney's understanding of the underlying facts of the alleged violations. The officers in the instant case comprise the complete eyewitness testimony available to the municipal prosecutor.

The Ohio Supreme Court, realizing these natural and logical aspects of a police officer's duty, states:

> "For purposes of a prosecution for bribery of a public official . . . an official duty can arise from useage as well as from a written rule or regulation. *United States v. Birdsoll,* (1914) 233 U.S. 223; *Kable v. State,* (1973), 17 Md. App. 16, 299 A. 2d 493, certiorari denied (1973), 268 Md. 750." *State v. Italiano,* 18 Ohio St. 3d 38, at 41.

Ohio courts have held that where dealt with in bribery cases, "duty" has been defined to be that which exists by reason of natural implication from the power specifically granted by statute or by reason of the lawful custom or regulation of a department of government. *State v. Carney,* 14 Ohio Op. 298, 28 Ohio L. Abs. 555 (Franklin County, 1939); *State v. Frabutt*, 18 Ohio Op. 2d 277 (Lake County, 1961).

Herein, it is a logical and "natural" implication that an arresting officer will relate facts and opinions to the

prosecuting attorney without coloring those matters in a manner desired by petitioner.

The trial court found the facts and evidence sufficient by which to find petitioner guilty of attempting to bribe two Cleveland Police Officers.

In *Curtis v. State,* 113 Ohio St. 187, 148 N.E. 834 (1925), this Court held that the fact that the person bribed fails to carry out his part of the compact, or has no opportunity to do so, is not material.

The Court in *Carney, supra,* holds that an officer's lack of jurisdiction is also immaterial.

It further appears that the criminal nature of an act as bribery is not lessened by the fact that the person to whom the bribe is offered is only a *de facto,* and not a *de jure,* officer, as long as that person is one or the other. 12 AM. JUR. 2d, *Bribery,* Section 14.

The case at bar clearly exhibits a fact situation in which petitioner intended his act of bribery to cause the officers to color their presentation of the facts in such a manner as to cause the unwitting assistant municipal prosecutor to reduce the charged offense to one which Riffel would not get "hurt" by suspensions or insurance companies (Joint Exhibit B, page 11).

This attempt at subtle bribery should not be allowed to prevail. The statute and case law join to place the intent to commit the crime upon the petitioner. The burden of proof, having been met before the trial court, exhibits by direct and circumstantial evidence that in spite of petitioner's legal training he perceived the scope of the officers' duties to include the recitation of facts to the prosecutor. Petitioner's act of bribery entails this

basic "duty", and is set forth in the record of proceeding by Joint Exhibit B and specifically, page 12.

The argument that the police officers could not, themselves, dismiss or reduce the charge before the court does not act to the benefit of petitioner. *Frabutt, supra,* holds that "it is not defense that a police officer does not have the power to quash a case as he was requested to do in exchange for money." Herein, the trial court clearly held that petitioner knew or had reason to believe that the opinions of the arresting officers would be seriously and conclusively considered by the assistant municipal prosecutor.

Petitioner argues through his brief that he did not attempt to influence the police officers *as witnesses.* This argument presupposes that the arresting officers are to stand mute when not seated upon the witness stand. Herein, petitioner insists that the officers, as both the charging parties and witnesses do not further participate in the preparation of their cases for trial or other resolution. This logic is quite damaging to the realities of criminal practice. Perhaps unsolicited opinions of witnesses may present some obscure reasons for this conclusion. However, where the government's attorney requests that assistance of witnesses, in the instant case, officers of the political subdivision, that assistance must be honestly, justly and lawfully extended. A ruling in support of the contentions set forth by petitioner will act to cause the necessity of uninformed prosecutions. Such ruling will further alienate the various representatives of the political subdivisions each from the others. Where no party has insisted that the arresting officers should control the decision making process, the expertise, assistance and indeed, eyewitness testimony of the officers must be

presented to the government's attorney in a professional unbiased manner.

The instant case clearly contains sufficient facts and evidence to overcome the argument of petitioner as a matter of law. Case law and statutes exhibit an understanding and contemplation of petitioner's contentions, and clearly fails to support those arguments.

Questions presented by petitioner, herein, construe the opinion of the Ohio Supreme Court to allow the delegation of prosecutorial functions to an arresting police officer. The instant fact situation when read with the Ohio Supreme Court's opinion does not support these contentions. Indeed Ohio's justices directly address this aspect of petitioner's argument. The Court terms petitioner's premise "an overly restrictive view of the police officer's [role] at a pre-trial." *Italiano* at 40.

Further, evidence presented at trial exhibits that the municipal prosecutor merely "deferred to the recommendation of the arresting officers in considering a reduction of the charge." *Italiano* at 40.

The Ohio Supreme Court holds:

> "Therefore, the officer was charged with the duty to confer with the prosecutor beyond merely relating the factual occurrence which led to the arrest, and it was this duty which defendant sought to influence through the payment of money." *Id.* at 40-41.

CONCLUSION

Petitioner's arguments do not present questions of law or fact which establish jurisdiction for granting of his petition for writ of certiorari.

No question exists whereby this Honorable Court can conclude that the right to due process of law was denied to the petitioner.

Therefore, we respectfully urge that this petition for writ of certiorari be denied.

Respectfully submitted,

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